STATEMENT OF
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UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE
UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON AGRICULTURE

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CONCERNING

Review of Recent Litigation on Forest Service
Firefighting and Forest Health Efforts

Mr. Chairman: Thank you for the opportunity to appear before you today to provide the Department's assessment of the impacts of recent court rulings on the Forest Service use of categorical exclusions and fire retardants. For the litigation involving the use of categorical exclusions both parties have filed notices of appeal of the ruling, and the Government has filed a motion for stay pending appeal. Due to the on-going litigation in these cases, I am obliged to limit my testimony to the impacts of these court rulings on the Forest Service, and not the merits of the cases.

Use of Categorical Exclusions

The recent court ruling on the Forest Service use of categorical exclusions has a significant impact on a range of management activities throughout the country. Thousands of projects that we had found to have insignificant environmental impacts will now be subject to formal notice, comment and appeal, lengthening the time to conduct

such activities, increasing their costs, and potentially increasing the amount of information that will be needed to document decisions.

Furthermore, the ruling is inconsistent with congressional intent as we understand it for two categories of projects which Congress specifically legislated in order to expedite agency work—applied silvicultural treatment projects under the Healthy Forest Restoration Act and oil and gas development in the Energy Policy Act. In both instances, Congress legislated categorical exclusions with the expectation that the effects would be reduced process, cost and time to complete the high-priority work. That expectation will be largely nullified by this ruling.

Of foremost concern is the effect of the court ruling on the hazardous fuels reduction work that is accomplished with multiple methods and often with multiple partners. For fiscal year 2006, we estimate that about half of the annual hazardous fuels treatment target will be accomplished using categorical exclusions. This means that all those projects are now subject to another 30 to 135 days of administrative process prior to implementation on the ground.

Categorical exclusions, as defined by the NEPA regulations of the Council on Environmental Quality (40 CFR 1508.4), are categories of actions that do not have a significant effect on the human environment (individually or cumulatively) and have been found to have no such effect by a federal agency in the agency NEPA procedures. These categories of actions were established through public notice and comment for actions that were found to be minor in nature and to have individually and cumulatively insignificant environmental effects. We have developed categories of excluded activities through a public process supported by a record of analysis of documented environmental effects of over 2400 projects. The Forest Service used this NEPA category – categorical exclusions – to identify projects and activities that are excluded from the notice, comment, and appeal provisions of the Appeals Reform Act. The Forest Service project appeal regulations (36 CFR 215), issued in 2003, provide that projects and activities which are categorically excluded from further analysis and documentation in an

environmental impact statement (EIS) or environmental assessment (EA) are not subject to notice, comment and appeal.

The *Earth Island Institute v. Ruthenbeck* case (formerly *Earth Island Institute v. Pengilly*) was filed in October 2003 by five non-profit groups alleging that the Forest Service's authorization of the Burnt Ridge Restoration Project, on the Sequoia National Forest violated the National Environmental Policy Act (NEPA), the National Forest Management Act (NFMA), the Appeals Reform Act (ARA) and the Administrative Procedures Act (APA). The original project analysis was categorically excluded from additional documentation. A decision was made and documented in a Decision Memo. This decision was withdrawn in March 2004 after the district court for the Eastern District of California issued a preliminary injunction against the project in December 2003.

The court nevertheless ruled on the plaintiffs' facial challenge to the validity of the appeal regulations (36 CFR 215) including the exemption of categorically excluded projects and activities projects from the notice, comment and appeal regulations. The court has since issued three decisions regarding the Forest Service project appeal regulations at 36 CFR 215. First, on July 7, 2005, Judge Singleton filed a ruling invalidating certain provisions of the project appeal regulations (36 CFR 215), including the provision of the appeal regulation that exempted categorically excluded projects and activities from notice, comment and appeal. The judge stated,

> The ARA certainly permits exclusion of environmentally insignificant projects from the appeals process. For example, actions such as maintaining Forest Service buildings or mowing ranger station lawns need not be subject to the notice, comment and appeal procedures. Actions that concern "land and resource management plans," however, "shall" be subject to notice, comment and appeal procedures.

On July 22, 2005, an attorney for the plaintiffs sent a letter to the Department of Justice stating that he would move for contempt if he did not receive a letter by July 26 stating the agency was immediately suspending all categorically excluded actions implementing forest plans which have not been made subject to comment and appeal. On July 28, 2005, plaintiffs filed a motion to hold the Forest Service and Chief Dale Bosworth in contempt of court.

The Department of Justice, in its response, refuted the contempt claim and asked the court to clarify that its ruling was effective only in the Eastern District of California and should apply only to decisions issues after July 7th.

The second order, on September 20, 2005, made by Judge Singleton clarified that his July order applies nationally and prospectively from July 7, 2005. The Judge denied the plaintiffs' motion for contempt, but warned that 'the Court fully intends to enforce its orders.

On September 21, 2005, plaintiffs wrote another letter to Department of Justice threatening a second motion to hold the Forest Service in contempt if the Forest Service refused to immediately comply with the order.

In response to the judge's order and faced with an aggressive plaintiff sending letters threatening contempt motions, the Chief of the Forest Service issued direction to the field to immediately suspend all categorically excluded proposed actions and ensure that all such projects are subject to the notice, comment and appeal provisions.

On October 19, 2005, the court issued a third order in response to the plaintiff's motion to clarify. Judge Singleton clarified what categorically excluded decisions are not subject to notice, comment and appeal under the court's order.

Based on the court's order, the following actions are now expressly subject to notice, comment and appeal.

- timber sales;
- prescribed burning;
- cutting trees for thinning or wildlife purposes over 5 contiguous acres; (Thinning is a critical activity for ecosystem restoration. Timber sales, prescribed burning, and thinning are conducted to reduce hazardous fuels.)
- creating or maintaining wildlife openings; (This activity is a key wildlife habitat improvement for creating habitat diversity, edges and hiding cover.)
- designating Off Highway Vehicles (OHV) routes;
- constructing new OHV routes and facilities;
- upgrading, widening, or modifying OHV routes;
- special use permits for OHV activities;
- gathering geophysical data using certain techniques;
- trenching for data gathering on mineralization; and,
- clearing vegetation for sight paths for minerals, energy, or geophysical investigation or support facilities. (Inclusion of these last 3 activities imposes new procedural delays for virtually all oil and gas exploration activities.)

Impacts of Orders on Forest Service Actions

For the kinds of projects that include actions not exempted by the October 19 order, the Forest Service will now have to provide notice and opportunity to comment and appeal. The notice, comment and appeal process could add up to 135 days to the timeline before a project can be approved and implemented. The level of public interest and comment on a project determines if an appeal period, with a potential 105 day period for filing and reviewing appeals, is required for a project decision. Additionally, this court ruling would apply to any new categorical exclusions developed in the future for the actions listed in the October 19 order, thereby potentially expanding future impacts of this court ruling.

I have some data to share with the Committee on the impacts of these court orders on Forest Service activities. We asked each of the nine Forest Service Regions to provide estimates of categorically excluded projects with activities listed in the October 19 order

that are now subject to notice, comment and appeal. All of these projects would have been prepared with our previous public involvement and environmental analysis procedures, but would have been exempt from notice, comment and appeal.

The Regions report that as a result of the October 19 clarifying order, over 800 projects are now subject to notice, comment and appeal. This figure includes projects in fiscal years 2005 and 2006. The Regions report the following number of projects for each of the activities listed in the October order:

- about 260 small timber sales, each of which may include up to 1,000 acres of hazardous fuels treatments by thinning, up to 70 acres of live tree harvesting, salvaging of dead or dying trees up to 250 acres, or sanitation harvest to control insects or disease of up to 250 acres;
- about 210 prescribed burning projects for hazardous fuels reduction treatments on up to 4,500 acres;
- over 30 wildlife opening projects;
- about 7 OHV route designations;
- over 9 new OHV route and facility construction;
- about 14 OHV route modifications;
- over 6 special use permits for OHV activities or events;
- over 215 projects for cutting trees for thinning or wildlife habitat improvement in an area greater than 5 acres;
- over 20 geophysical data gathering projects;
- about 7 trenching projects for mineralization evidence; and
- about 20 projects for clearing vegetation for sight paths for minerals, energy, or geophysical investigation or support facilities.

The Regions estimated the acreage of these projects now subject to notice, comment and appeal to be over 1.2 million acres. This acreage figure includes about 900,000 acres of hazardous fuels reduction projects as part of the national FY 2006 target of 1.8 million acres for hazardous fuels reduction treatments. This 900,000 acre estimate includes almost 600,000 acres of prescribed burning in the Southern Region. One effect of the

increased timeframes is missing prescriptive windows of air quality limitations for prescribed burning. Delaying prescribed burning activities increases fuel loading, creating higher risks and potentially higher smoke emissions. Moreover, increased fuel loads add to the complexity of the burns with the potential for fire escapes and need for more people and equipment, thus increasing costs. Higher fuel loads increase fire intensities and behavior putting project crews at risk. An additional potential impact the Regions report is to neighboring communities. Over 230 neighboring communities would potentially benefit from these hazardous fuels reduction projects if they were not delayed.

As was previously stated, the categories of excluded activities were developed through a public rulemaking process supported by a record of documented environmental effects which concluded that these activities have insignificant environmental effects.

The procedural changes brought on by rulings in the *Earth Island Institute* case will have an important consequence on our ability to conduct routine operations where there are no adverse effects on extraordinary circumstances. Being able to move swiftly to accomplish project work is essential to people whose livelihood is dependent upon time-sensitive decision making. In fact, the risk of not taking action may often exceed the environmental effects of project implementation.

Our inability to promptly handle routine matters has an effect on the public, our customers and partners. Hazardous fuel treatment operations that are coordinated across land ownerships will become more complicated, time consuming and potentially less effective due to procedural delays that affect National Forest System lands that adjoin other federal, state and private lands to be treated in the same proposal. An overarching goal in the President's Healthy Forest Initiative (HFI) and the Congressionally-enacted Hazardous Fuels Reduction Act (HFRA) was to reduce the amount of time and cost associated with the forest restoration and hazardous fuels reduction treatments where the scope of effects was well understood and the Forest Service's experience had concluded there were no significant environmental effects. Achieving this goal is now that much more challenging.

But the impacts of the ruling go beyond fuels reduction projects. In the recently enacted Energy Policy Act, (P.L. 109-58) Congress directed federal agencies to respond to energy-related activities more quickly. Many of the routine and minor proposals we deal with involve coordination of those proposals and activities on BLM lands. The difference of time in terms of our ability to respond to proposals versus those of the BLM creates unnecessary procedural challenges when responding to energy-related proposals.

Our off-highway vehicle program provides enjoyment for thousands of motorcycle, ATV, jeep and snowmobile enthusiasts. Special events on National Forest System lands are a popular activity for many clubs, an activity that requires a special use permit. Because clubs often do short-term event planning, in the past we have been able to respond within a few weeks to meet their schedule. Now, we will need up to 7-months lead time for notice, comment, analysis, and appeal opportunity to issue a special use permit for an OHV activity. For example, a motorcycle club had planned an enduro ride on the Eldorado National Forest in California. The event had to be cancelled because the Forest Service couldn't comply with the court order and issue the special use permit in time.

The recent ruling on project appeal procedures for categorically excluded activities will have a far-reaching impact on the Forest Service's ability to quickly respond to resource management needs and partner requests for work of a routine nature with insignificant environmental effects. We know the recent court orders impact not just our activities, but also our neighboring communities and land owners, permittees, contractors, and other government agencies. Moreover, the court's ruling has resulted in some loss of efficiency gained and we have, therefore, lost some of the efficiencies gained in the last few years with the President's Healthy Forest Initiative and your Healthy Forest Restoration Act for ecosystem restoration and hazardous fuels reduction.

Use of Fire Retardant

In a decision filed on October 24, 2005, the Federal district court for the District of Montana held that the Forest Service's failure to conduct an environmental analysis on the use of long-term chemical fire retardant on National Forest System land violated the National Environmental Policy Act (NEPA), and that the agency's failure to engage in formal consultation on this activity similarly violated the Endangered Species Act (ESA).

Regarding NEPA, the court concluded, "The USFS decision to allow the use of chemical fire retardant on national forests has a direct immediate effect on the environment." Additionally, the court stated, "…the USFS decision not to consult NEPA in the annual dumping of millions of gallons of chemical fire retardant on the national forests is unreasonable."

Regarding ESA, the Court held that the Forest Service's reliance on emergency consultations for long-term retardant dropped in waters inhabited by listed species did not excuse the lack of formal consultation with the Fish and Wildlife Service and the National Marine Fisheries Service. The Court ruled that "The use of long-term fire retardant is not unexpected but guaranteed; the only question is when and where it will be used. There is no reason why the USFS cannot conduct formal consultation with FWS and no reason to find that the ESA requires anything else."

In its order, the court stated that while Plaintiffs had requested "additional injunctive relief", they had not specifically requested that the court enjoin the Forest Service from using the fire retardants, and so no injunction was issued. The court ordered the Forest Service to comply with NEPA and to begin formal consultation with the Fish and Wildlife Service under ESA.

The court left to the Forest Service's discretion whether to conduct an environmental assessment (EA) or a more comprehensive environmental impact statement (EIS) to

comply with NEPA. Preliminary estimates by agency staff indicate that a programmatic EIS, should we decide to go that route, might take up to 2 years to complete.

Even prior to this case, the Forest Service worked with FWS and NMFS for some time on the subject of how we might conduct ESA section 7 consultations for firefighting activities, and did not reach a conclusion. Therefore we are not able to estimate what amount of additional activity, or what additional cost, would be required by the court's order. At this point, we have not verified that FWS and NMFS will accept a programmatic consultation of this nature. If they would not, then we face the prospect of additional difficulty in complying with this order.

We note that, while the court in this case did not enjoin the use of the retardant while the required NEPA and ESA activities are conducted, there is still the possibility of an injunction in the future. The judge did make a decision on the merits of the NEPA and ESA claims, so it is possible that another plaintiff, in this or another venue, could cite this finding and seek an injunction, which a court could grant. So we will be in a state of uncertainty as to the availability of this firefighting tool even as we begin compliance with this order.

This concludes my statement, I would be happy to answer any questions that you may have.